UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	Civil Action No. H-01-3624 And Consolidated Cases
vs.	§	
ENRON CORP., et al.,	§	
Defendants.	§	

CORRECTED MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DEUTSCHE BANK AG'S MOTION TO DISMISS

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CORRECTED MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DEUTSCHE BANK AG'S MOTION TO DISMISS

Deutsche Bank AG ("Deutsche Bank") respectfully submits this memorandum of law in support of its motion to dismiss the Consolidated Complaint for Violation of the Securities Laws in the Newby action (the "Newby Complaint") pursuant to Fed. R. Civ. P. 12(b), 9(b), and 8.

PRELIMINARY STATEMENT

Although the Newby Complaint is over 500 pages and makes allegations against more than 80 defendants, the few allegations against Deutsche Bank are deficient, and present a clear basis to dismiss Deutsche Bank from this case. Plaintiffs attempt to lump Deutsche Bank together with several other defendants and to rely on the widespread publicity that Enron's activities have received do not plead a sufficient or viable case against Deutsche Bank. Indeed, his Court has already recognized that "in the final analysis this Court is obligated to apply the express, objective criteria of the law and the underlying purpose of the PSLRA to the facts before it ...." In re Enron Corp. Sec. Litig., CIV. A.H-01-3624, 2002 WL 530588, at *18 (S.D. Tex. Feb. 15, 2002). The criteria to be applied to this motion to dismiss are set forth in a concise group of cases from this Circuit, which are the focus of the discussion below.[1] It is these cases which mandate the dismissal of the claims against Deutsche Bank.

Most of the Newby Complaint is directed against other parties – particularly the public statements, SEC filings and actions of Enron Corporation, including its officers and directors ("Enron"), and Enron's former accountants, Arthur Andersen LLP ("Andersen"). Deutsche Bank

[1] E.g., Nathenson v. Zonagen Inc., 267 F.3d 400 (5th Cir. 2001); Lovelace v. Software Spectrum Inc., 78 F.3d 1015 (5th Cir. 1996); Melder v. Morris, 27 F.3d 1097 (5th Cir. 1994); Tuchman v. DSC Communics. Corp., 14 F.3d 1061 (5th Cir. 1994); In re Azurix Corp. Sec. Litig., 2002 WL 562819 (S.D. Tex. Mar. 21, 2002); In re BMC Software, Inc. Sec. Litig., 183 F. Supp. 2d 860 (S.D. Tex. 2001); McNamara v. Bre-X Minerals Ltd., 57 F. Supp. 2d 396 (E.D. Tex. 1999).

was only recently added to this action – well after Enron's bankruptcy, and the indictment and financial difficulties of Andersen. Deutsche Bank is only mentioned in about 40 of the Complaint's 1,030 paragraphs.[2] It is alleged that Deutsche Bank engaged in the lawful activities of providing banking, financial advisory, and underwriting services to Enron, and that Deutsche Bank (through its subsidiary Deutsche Bank Alex. Brown) issued research reports about Enron.

No claims are made against Deutsche Bank for any securities filing connected with its financial advisory or underwriting services under the 1933 Act. Rather, Deutsche Bank is sued solely under Sections 10(b) and 20(a) of the 1934 Act, allegedly because it did business with Enron and because of statements made in certain of its research reports. This claim appears to rest on two unsupported and broad allegations in the Newby Complaint: (i) that various banks, including Deutsche Bank, "conspired" with Enron so as to keep earning Enron-related fees; and (ii) that the firewalls mandated by federal regulations – and which prohibited Deutsche Bank's research analysts from communicating with or receiving information from other parts of the bank which did business with Enron – were not effective. Based on these general and unsupported premises, plaintiffs allege that the research reports were false and misleading because of the knowledge of an alleged fraud that should be imputed to the bank as a whole.

Thus, notwithstanding the apparent heft of the Complaint, plaintiffs have failed to offer any specific factual allegations to support a claim *that Deutsche Bank* knowingly made false or misleading statements about Enron, conspired with Enron, or otherwise acted with scienter in making any public statements about Enron. (Point I, below.) The Newby Complaint also fails to establish the materiality of any statements allegedly made by Deutsche Bank, including because

[2] For the Court's convenience, an attached Appendix lists the few paragraphs of the Newby Complaint that actually mention or appear to relate to Deutsche Bank.

these statements were no different than other publicly available information and/or were statements containing nothing more than what the Fifth Circuit has labeled non-actionable "puffery." (Point II, below.) Plaintiffs also have failed to plead any basis for a duty running from Deutsche Bank to the plaintiffs with regard to its research opinions about Enron. (Point III, below.) In place of particularized pleading, plaintiffs offer media reports, including articles directed at all the financial institutions that did business with Enron. Sound bites are no substitute for the concise notice pleading required by Rule 8. (Point IV, below.) Finally, based in part on the failure of their Section 10(b) claims, plaintiffs' claims under Section 20 of the 1934 Act also should be dismissed as a matter of law. (Point V, below.)[3]

FACTUAL BACKGROUND

The original complaint in this action was filed on October 22, 2001. On April 8, 2002, plaintiffs first added Deutsche Bank as a defendant, and only as to their First Claim For Relief under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5. Newby Cpt. ¶¶ 992-97.

Deutsche Bank is a financial services company that includes Deutsche Bank Alex. Brown. It provides commercial lending, investment banking, financial advisory, and underwriting services to corporations. Deutsche Bank, through Deutsche Bank Alex. Brown, also issues research opinions and reports on public companies. See Newby Cpt. ¶ 107.

The Complaint is filed on behalf of purchasers of Enron stock during the period October 19, 1998 and November 27, 2001 (the "Class Period"). Newby Cpt. ¶ 1. With regard to specific Deutsche Bank connections with Enron or Enron-related entities, plaintiffs list various securities

[3] For the convenience of the Court, and in the interests of brevity, we have not repeated arguments made by other bank defendants in their motions to dismiss. To the extent applicable, however, those arguments are adopted and incorporated in Deutsche Bank's motion to dismiss.

offerings, including private placements, where Deutsche Bank allegedly acted as an underwriter. Newby Cpt. ¶¶ 48-49, 135, 590, 790-792, 795. Although no claim is asserted against Deutsche Bank under the 1933 Act, plaintiffs broadly allege that "the Registration Statements and Prospectuses for the Enron securities sales where Deutsche Bank was one of the lead underwriters contained false and misleading statements." Newby Cpt. ¶ 795. The Complaint, however, cites no specific statements from any Registration Statement or Prospectus as having been false, misleading or incomplete. In addition, this Court has recently dismissed a securities class action directed at the sufficiency of disclosures with regard to Azurix Corporation, an Enron-owned company that was the subject of an initial public offering in June 1999 that was underwritten by Deutsche Bank. Compare Newby Cpt. ¶¶ 49, 590, 792 with In re Azurix Corp. Sec. Litig., No. H-00-4034, 2002 WL 562819 (S.D. Tex. Mar. 21, 2002).[4]

Plaintiffs also allege that Deutsche Bank loaned money to Enron during the Class Period, including as one of the banks which participated in one loan to the LJM2 partnership. Newby Cpt. ¶¶ 26, 647-48, 787, 793. Plaintiffs allege that Deutsche Bank engaged in these transactions with Enron so that it could receive "huge fees and interest payments for those loans and syndication services." Newby Cpt. ¶¶ 794, 796.

The bulk of the allegations against Deutsche Bank relate to research opinions and reports issued during the Class Period. Only twelve reports are cited, covering the period January 1999 through September 2000. Newby Cpt. ¶¶ 127, 131, 146, 152, 159, 184, 210, 232, 237, 243, 253, 257. As selectively excerpted by plaintiffs in the Complaint, these reports generally tracked announcements or other statements by Enron itself. At various points, plaintiffs allege that *all* of

[4] Deutsche Bank was not a defendant in that action, and is not sued in the Newby Complaint, for anything involving Azurix Corporation.

the research reports issued by various defendants were false and misleading because they did not disclose certain "true but concealed facts." In all cases, these "concealed facts" related to Enron's alleged misconduct. None of these paragraphs plead any facts or allegations as to how *Deutsche Bank* knew or should have known about the asserted misconduct by Enron. See Newby Cpt. ¶¶ 155 (for the period October 21, 1998-July 6, 1999), 214 (for the period July 13, 1999-February 28, 2000), 300 (for the period March 31, 2000-March 1, 2001).

The allegations relating to Deutsche Bank's knowledge and scienter generally are directed at many defendants, of which Deutsche Bank is only one. No facts or allegations are pled that are particularized to Deutsche Bank. For example, the Complaint alleges that Deutsche Bank, among many banks, received fees from doing business with Enron. See Newby Cpt. ¶¶ 17, 26, 70(c), 72, 288, 647, 794, 796. These allegations, in turn, often rely on news articles which are repeatedly quoted in the Complaint. See, e.g., Newby Cpt. ¶¶ 71-72, 643-45, 648.

Other paragraphs relating to Deutsche Bank's alleged knowledge are set forth as to Deutsche Bank but simply parrot, virtually word-for-word, the allegations made against other bank defendants. These allegations, once again, lack any particularized detail. For example, the Complaint alleges that Deutsche Bank "constantly interacted with top executives of Enron . . . on almost a daily basis throughout the Class Period." Newby Cpt. ¶ 788. Compare Newby Cpt. ¶¶ 653, 675, 694, 716, 736, 751, 763, 774 (identical allegations against other bank defendants). Nowhere in the voluminous Complaint, however, is there any reference to any actual meeting between anyone from Deutsche Bank and anyone from Enron.

As a predicate for their claims relating to the research reports, plaintiffs allege that "Deutsche Bank functioned as a consolidated and unified entity. There was no so-called 'Chinese Wall' to seal off the Deutsche Bank securities analysts from the information Deutsche Bank obtained rendering

commercial and investment banking services to Enron." Newby Cpt. ¶ 789. Once again, no supporting facts – let alone any facts specific to Deutsche Bank – are pled, and once again, this identical allegation is made against the other bank defendants. Newby Cpt. ¶¶ 654, 676, 695, 717, 737, 764, 775. (Plaintiffs, however, do appear to recognize and concede that Deutsche Bank was *not* one of Enron's principal banks during the Class Period. See Newby Cpt. ¶¶ 305, 313, 324 (alleging that Enron, Anderson, other defendants, and "certain of Enron's bankers" – other than Deutsche Bank – took certain actions)).

Based on these allegations, plaintiffs claim that Deutsche Bank participated in the fraud alleged against Enron and others, and is responsible for the alleged statements made by Enron and other defendants. Newby Cpt. ¶¶ 795-96, 798-99, 993(d)-997. As demonstrated below, these allegations do not satisfy the very high and specific requirements for pleading claims against Deutsche Bank.

STANDARDS FOR DISMISSAL

As this Court has observed, "the purpose of the PSLRA is to tighten requirements for pleading a viable securities fraud action to protect companies from unfounded suits." In re BMC Software Inc. Sec. Litig., 183 F. Supp. 2d 860, 885 n.33 (S.D. Tex. 2001).[5] In Nathenson v.

[5] With respect to the claims only recently advanced against Deutsche Bank, the Joint Explanatory Statement of the Committee of Conference contained within the House Report on the PSLRA is directly applicable and compelling:

> Congress has been prompted by significant evidence of abuse in private securities lawsuits to enact reforms to protect investors and maintain confidence in our capital markets. The House and Senate Committees heard evidence that abusive practices committed in private securities litigation include: (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) *the targeting of deep pocket defendants*, including accountants, underwriters, and individuals who may be covered by insurance, *without regard to their actual culpability*; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent.

Zonagen, 267 F.3d 400 (5th Cir. 2001), the Fifth Circuit discussed in detail how claims under Section 10(b) of the 1934 Act and Rule 10(b)-5 must be pled under the PSLRA. Plaintiffs must plead, in connection with the purchase or sale of securities.

> (1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which plaintiff relied (5) that proximately caused [the plaintiff's] injury.

267 F.3d at 406-407, citing Tuchman v. DSC Communics. Corp., 14 F.3d 1061, 1067 (5th Cir. 1994). Because the claim sounds in fraud, plaintiffs must plead facts with particularity. Id. at 1067-68. Conclusory allegations, however, are not "facts" that will defeat a motion to dismiss under Rule 9(b) or the PSLRA. In re BMC Software, 183 F. Supp. 2d at 865 n.13.

"Scienter is a crucial element of the securities fraud claims in this case. Scienter must be shown because not every misstatement or omission in a corporation's disclosures gives rise to a Rule 10b-5 claim." Tuchman, 14 F.3d at 1067. As the Nathenson court held, the stringent and heightened pleading standards of the PSLRA are particularly applicable to scienter. Nathenson, 267 F.3d at 407.

Nathenson held that as to each defendant, plaintiffs "must now plead specific facts giving rise to a 'strong inference' of scienter." Id. Failure to do so mandates dismissal of the complaint under the PSLRA, and Rules 12(b) and 9(b). Id. at 412-13 ("if the complaint does not meet [the PSLRA] requirements 'the court shall, on motion of any defendant, dismiss the complaint.'") (citation omitted); In re BMC Software, 183 F. Supp. 2d at 865 n.15 (allegations that fail under Rule 9(b) cannot satisfy more stringent PSLRA requirements and also fail under Rule 12(b)).

H.R. CONF. REP. NO. 104-369, at 31 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 730 (emphasis added).

In establishing the required "strong inference" of scienter, conclusory allegations regarding knowledge or state of mind will not suffice. Nathenson, 267 F.3d at 419-20, citing Lovelace v. Software Spectrum, Inc., 78 F.3d 1015, 1019 (5th Cir. 1996); see Melder v. Morris, 27 F.3d 1097, 1102 (5th Cir. 1994); Tuchman, 14 F.3d at 1069; In re BMC Software, 183 F. Supp. 2d at 865 nn.13, 15. Similarly, broad allegations regarding common actions by groups of defendants will not satisfy the pleading requirements of the PSLRA. Zishka v. Amer. Pad & Paper Co., No. 3:98-CV-0660-M, 2000 WL 1310529, at *1 (N.D. Tex. Sept. 13, 2000).

Rather, the Fifth Circuit requires plaintiffs to plead specific facts as to *each* defendant's actions, such as who at each defendant learned which facts at what time, and how that knowledge related to any alleged misstatements of fact. Lovelace, 78 F.3d at 1019-20; Melder, 27 F.3d at 1103-04. In sum, plaintiffs must plead particularized facts as to each defendant sufficient to demonstrate either intentional misconduct or severe recklessness. In this regard, general allegations of a defendant's motive and opportunity to commit securities fraud will not, "standing alone," meet the strict pleading requirement for scienter. Nathenson, 267 F.3d at 410-11 (even though motive and opportunity may "contribute or be relevant to demonstrating scienter"). Plaintiffs have failed to satisfy these pleading requirements with respect to Deutsche Bank in the Newby Complaint.

ARGUMENT

POINT I

PLAINTIFFS HAVE FAILED TO PLEAD SPECIFIC FACTS AS TO DEUTSCHE BANK REGARDING KNOWLEDGE OR SCIENTER

The Newby Complaint is, as such, nothing more than a thinly disguised "aiding and abetting" claim, in which plaintiffs attempt to lump Deutsche Bank in with other banks that were also named

as defendants and sweep them along with the fraud principally alleged against Enron and Andersen. But in trying to sweep Deutsche Bank along with the other 990 paragraphs of the complaint, plaintiffs have ignored the Fifth Circuit's – and this Court's – consistent holding that a securities fraud claim must set forth specific, detailed facts as to *each* defendant and may not loosely plead conclusions regarding knowledge or scienter, nor plead mere guilt by association. Plaintiffs' failure to plead adequately critical elements of their claim mandates dismissal under the stringent requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), pub. L. No. 104-67, 109 stat. 737 (Dec. 22, 1995) and Fed. R. Civ. P. 12(b), 9(b), and 8.

The only particular and specific facts relating to Deutsche Bank in the Newby Complaint cite business transactions that Deutsche Bank allegedly engaged in with Enron or Enron-related entities, or research reports issued by Deutsche Bank about Enron during the Class Period. Those actions, in and of themselves, do not link Deutsche Bank with the alleged fraud set forth in the Complaint. Thus, there are no facts pled that would demonstrate that Deutsche Bank knew or should have known what plaintiffs continually refer to as the "true but concealed facts" about Enron, or that Deutsche Bank otherwise acted with scienter.

Plaintiffs attempt to clear their high pleading hurdles as follows:

- By alleging a number of transactions in which Deutsche Bank acted as an underwriter, and that "the Registration Statements and Prospectuses for the Enron security sales where Deutsche Bank was one of the lead underwriters contained false and misleading statements." See Newby Cpt. ¶¶ 790-93, 795. One of these transactions involved the initial public offering of an Enron-owned company, Azurix Corporation, in June 1999. Id. ¶¶ 49, 590, 792.

- By alleging that Deutsche Bank "constantly interacted with top executives of Enron . . . on almost a daily basis throughout the Class Period." Newby Cpt. ¶¶ 788, 798.

- By alleging that Deutsche Bank's research reports did not disclose "true but

concealed facts" relating to various aspects of Enron's business that plaintiffs claim were part of a scheme to defraud investors. See, e.g., Newby Cpt. ¶¶ 155, 214, 300.

- By alleging that there was no "so-called 'Chinese Wall' to seal off the Deutsche Bank research analysts from the information Deutsche Bank obtained rendering commercial and investment banking services to Enron." Newby Cpt. ¶ 789.

- By alleging that Deutsche Bank received "significant fees" from doing business with Enron, and acted out of a desire to continue earning these fees. Newby Cpt. ¶¶ 17, 26, 70(c), 72, 288, 647, 649, 794, 796.

None of these general allegations meet the standards set by the Fifth Circuit and this Court. They also do not demonstrate any fraud by Deutsche Bank.

As an initial matter, pleading that a defendant – even an officer or director – had unspecified "contact" with an issuer that made alleged misstatements does not adequately plead facts supporting knowledge or scienter. In Melder, the Fifth Circuit affirmed the dismissal of securities claims that premised the defendant-officers' and -directors' knowledge on their positions at the issuer. 27 F.3d at 1103. See also Tuchman, 14 F.3d at 1069-70 (affirming dismissal and finding that corporate officers' knowledge of problems did not constitute knowledge that statements regarding those problems were false or misleading).

Similarly, in In re BMC Software, this Court dismissed claims against BMC's officers that were based merely on their being executives. The alleged involvement of defendants in the day-to-day management of BMC's business did not support the conclusion that they had access to *particular* internal corporate documents or communications regarding the alleged fraud. This Court held that "Plaintiffs must allege what actions each Defendant took in furtherance of the alleged scheme and specifically plead what he learned, when he learned it, and how Plaintiffs know what he learned." 183 F. Supp. 2d at 886. Based on this holding, this Court also rejected broad and

general allegations that groups of defendants knew or should have known certain "true but concealed facts." Id. The allegations in the Newby Complaint are the same types of general allegations this Court rejected in In re BMC Software.

Plaintiffs also never allege any specific false or misleading statements in any Registration Statement or Prospectus relating to any transaction in which Deutsche Bank was an underwriter. Indeed, securities fraud claims relating specifically to the Azurix IPO were recently dismissed by this Court. See In re Azurix Corp., 2002 WL 562819.[6] Moreover, four of the transactions highlighted as against Deutsche Bank were lending transactions that are not even subject to the securities laws. See Newby Cpt. ¶ 793. With regard to the issuance of research reports and the receipt of fees, Fifth Circuit courts have spoken clearly: rote allegations of knowledge or scienter are not enough.

For example, in McNamara v. Bre-X Minerals Ltd., 57 F. Supp. 2d 396 (E.D. Tex. 1999), investors brought securities fraud claims against a Canadian mineral company, its holding company, various officers and directors of those companies, and underwriters who had done business with those companies and/or issued research reports on them. The complaint was based on alleged misrepresentations regarding reports of gold deposits in Indonesia that inflated the value of the company's shares. Id. at 401-02. As to the underwriters, it was specifically alleged that various research analysts had visited the company's mining sites and met with company officials. As in the Newby Complaint, the McNamara plaintiffs claimed that based on their contacts with the company, the underwriters knew of the alleged scheme to overstate the company's gold reserves and were motivated to join the alleged fraud by a desire to collect fees for advising the company. Id. at 417-

[6] Indeed, with respect to two issuances of Enron shares prior to April 1999 (Newby Cpt. ¶ 790), any claims would otherwise be time-barred. See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991).

21, 422-23.

The District Court granted the underwriters' motions to dismiss. In rejecting broad conclusory allegations regarding the knowledge of various defendants, the court stated that "rote conclusory allegations that the defendants 'knowingly did this' or 'recklessly did that' failed to meet the heightened pleading requirements of Rule 9(b)." Id. at 404, citing Lovelace, 78 F.3d at 1019. With respect to each underwriter, the court found that plaintiffs had not pled facts showing how and when *each individual research analyst* would have learned the adverse information that was at the heart of the alleged fraud. Thus, it was not enough for plaintiffs to allege generally that a research analyst had visited the issuer's mining site or spoken with company officials. Plaintiffs had to plead facts regarding *specific* communications or documents that would have placed *each* defendant on notice of the elements of the alleged fraud highlighted by plaintiffs. Id. at 420-21, 423. Moreover, the alleged desire of the defendants to profit from doing business with the issuer was held insufficient to plead scienter under Rule 9(b). Id. at 423, citing Melder, 27 F.3d at 1103.

In a subsequent decision, the court upheld the complaint only as to certain defendants, and only after plaintiffs had followed the court's express instructions and pled specific facts sufficient to show (i) what information each research analyst had received regarding the issuer's gold deposits; (ii) when that information was received; (iii) what testing of sample deposits each research analyst had witnessed (the alteration of test samples was at the heart of the fraud); (iv) each research analyst's professional background (i.e., should they have known whether the testing conformed to industry standards); and (v) what each research analyst witnessed in visits to the issuer's mining site that should have alerted them to the substantial risk of fraud. McNamara v. Bre-X Minerals Ltd., No. 5:97-CV-159, 2001 WL 732017, at *66 (E.D. Tex. Mar. 30, 2001). The court upheld the complaint against the issuer's financial advisor and principal research firm based on painstaking

pleadings that satisfied the list set forth above. Id. at *53-55, *62-64. The court, however, dismissed with prejudice the claims against another research firm against whom plaintiffs could not plead the requisite facts. Id. at *66-68.

The McNamara holdings also are consistent with this Court's rulings that an issuer generally is not responsible for a third-party's alleged misstatements absent specific allegations regarding specific communications that support a claim that a defendant exercised control over that third-party or was otherwise "entangled" with them. General and conclusory allegations regarding "relationship" will not survive Rule 12(b) and 9(b) challenges. See In re BMC Software, 183 F. Supp. 2d at 892; In re Azurix, 2002 WL 562819, at *18.

McNamara is instructive on the precise levels of detail required for a plaintiff to plead securities fraud. In the instant case, the allegations against Deutsche Bank are less specific than those rejected in the McNamara decisions. Plaintiffs have not pled detailed facts showing when, how, or where Deutsche Bank learned of the alleged scheme to defraud, or what facts the bank received that should have placed it on notice. In addition, no facts are pled that would provide any basis to believe that Deutsche Bank knew adverse information about Enron that it did not disclose in its research reports. The Newby Complaint contains nothing more than general, conclusory broadsides (see Newby Cpt. ¶¶ 649, 651, 789, 795, 797-99) that are not "facts," but are the type of pleading the Fifth Circuit and this Court have repeatedly rejected. Thus, whether based on theories of direct or imputed knowledge, plaintiffs have not pled any particularized facts demonstrating that Deutsche Bank issued any statements about Enron with scienter.

Finally, the only motive that plaintiffs have offered for Deutsche Bank's alleged participation in a securities fraud is its desire to make money by doing more business with Enron. This kind of pleading was rejected as a matter of law in McNamara, and has been repeatedly and forcefully

rejected by the Fifth Circuit. For example, in Nathenson, the Court held that the alleged desire of an issuer and its officers and directors to enhance share value would not support a securities fraud claim. 267 F.3d at 420. In Melder, the Court noted that:

> Accepting the plaintiffs' allegation of motive – basically that the defendant officers and directors were motivated by incentive compensation – would effectively eliminate the state of mind requirement as to all corporate officers and defendants. . . . The district court aptly dubbed this allegation "a nihilistic approach to Rule 9(b) jurisprudence." Simply put, the lone allegation of motive is insufficient.

27 F.3d at 1102 (citations omitted). This reasoning also supported dismissal of claims against underwriters:

> The plaintiffs merely allege that the underwriters "agreed to participate in the wrongdoing alleged herein in order to obtain substantial fees, expenses and discounts in connection with the Offerings." [Citing the complaint in that case.]
>
> This lone allegation of motive fails on precisely the same rationale discussed [above] in relation to the other defendants. Simply put, accepting the plaintiffs' allegation of motive as sufficient would make a mockery of Rule 9(b) by effectively eliminating the scienter requirement as to securities underwriters since all underwriters are, of course, fee seekers.

Id. at 1104. In the instant case, the Newby Complaint fails for the same reasons and should be dismissed under Rules 12(b) and 9(b).[7]

POINT II

PLAINTIFFS HAVE FAILED TO PLEAD FACTS TO SUPPORT MATERIALITY

To plead materiality under Rule 9(b), plaintiffs must plead facts "showing that the defendant made an untrue statement of material fact, or failed to state a material fact necessary to make the

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[7] Plaintiffs' allegations against Deutsche Bank are really disguised claims for aiding and abetting an alleged fraud by others. Such aiding and abetting claims, however, are no longer permissible under Section 10(b) of the 1934 Act. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 177 (1994). The section on the "Involvement of Deutsche Bank" reads precisely as a claim for aiding and abetting. See Newby Cpt. ¶¶ 787-99. That is, rather than stating a claim of fraud against Deutsche Bank, plaintiffs assert that Enron committed the fraud, as the primary party, and that Deutsche Bank, in effect, rendered substantial assistance to Enron. This is precisely the type of secondary liability claim that is precluded by Central Bank. See Zishka, 2000 WL 1310529, at *5 (dismissing claims that "sound to the court like aiding and abetting claims").

statements that were made not misleading." Haack v. Max Internet Communics., No. Civ.A.3:00-CV-1662-G, 2002 WL 511514 at *4 (N.D. Tex. Apr. 2, 2002) (citation omitted); In re Azurix, 2002 WL 562819, at *12. A statement or omission is only material if "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); Basic, Inc. v. Levinson, 485 U.S. 224, 231-232 (1988).

In addition to altering the "total mix" of information, a statement, to be material, must be more than a general statement of corporate optimism, "puffery" or a general statement "about a company's progress" – none of which provide a basis for liability. Nathenson, 267 F.3d at 419, citing Lasker v. N.Y. Elec. & Gas Corp., 85 F.3d 55, 59 (2d Cir. 1996); In re Azurix, 2002 WL 562819, at *14 (expressions of confidence in company's management), *16 ("expressions of corporate optimism" as to issuer's future operating results), *18-20 (issuer's comments on "successful transactions," on being "a major participant" in the market, and on "strong growth"); In re BMC Software, 183 F. Supp. 2d at 892.

Here, plaintiffs have quoted from twelve Deutsche Bank research reports. Newby Cpt. ¶¶ 127, 131, 146, 152, 159, 184, 210, 232, 237, 243, 253, 257. Plaintiffs allege that these research reports "contain false and misleading statements concerning Enron's business, finances and financial condition and its prospects." Newby Cpt. ¶ 796. A review of the quotes provided in the Complaint, however, show two things, both of which undercut any claim that any research report issued by Deutsche Bank contained material information.

First, the cited reports generally commented on information that already had been released or announced by Enron. The reports also appear to have been consistent with other research reports

cited by plaintiffs.[8] As such, the Complaint offers no guidance as to how any report issued by Deutsche Bank changed the "total mix" of information available to the market.

Second, the quoted Deutsche Bank research opinions typically contain no more than general expressions of optimism in Enron's prospects. For example, a January 13, 1999 report (Newby Cpt. ¶ 127), noted that "Enron has a leading position in each of its core businesses"; had a "strong balance sheet"; and was a "well managed ... company." A January 20, 1999 report (Newby Cpt. ¶ 131), noted that in 1998 Enron had "an excellent year" and that Enron's "core businesses reported very strong recurring earnings." An April 2000 report (Newby Cpt. ¶ 232), noted that Enron's "strong Q1 earnings results and substantial business development in the wholesale, retail, and broadband segments bode well for continued earnings growth." Finally, on September 15, 2000, in its last cited report (Newby Cpt. ¶ 257), Deutsche Bank reiterated its "buy" opinion and stated that "Enron shares are ... uniquely positioned to benefit from strong energy market growth and the fantastic growth in information technology bandwidth." Deutsche Bank also noted that Enron was "well-managed" and that "Enron management has made very aggressive moves into several new businesses with great success and delivered on or exceeded nearly every promise made on schedule."

A comparison of these opinions with the cases cited above shows that the language quoted in the Complaint is nothing more than general statements of optimism or puffery. As such, the Newby Complaint does not plead facts sufficient to establish that these statements were material misstatements of fact. See In re BMC Software, 183 F. Supp. 2d at 890 ("They are too vague and incomplete to be material or to induce reliance, not to mention being offset by other disclosures.

[8] Indeed, Deutsche Bank's research reports maintain a consistent "buy" recommendation, while other reports cited in the Complaint appear to have raised their recommendations on Enron.

These statements lack the detail necessary to support a fraud claim and raise no inference of fraud."). Thus, the Newby Complaint should be dismissed on this ground as well.

POINT III
DEUTSCHE BANK'S RESEARCH REPORTS AND OPINIONS WERE NOT STATEMENTS OF FACT

As discussed above, plaintiffs have failed to plead facts sufficient to establish that any Deutsche Bank research opinion was issued with an intent to defraud. See Point I, supra. Accordingly, Deutsche Bank's research reports constitute non-actionable opinions, as to which Deutsche Bank owed no duty to plaintiffs (or anyone else) under the federal securities laws.

Opinions are generally not actionable, as they are not misstatements of fact. See In re Wash. Pub. Power Supply Sys. Sec. Litig., 650 F. Supp. 1346, 1350 (W.D. Wash. 1986). A research recommendation is a shorthand form of judgment regarding a company's prospects – it is someone's opinion – not a false statement of material fact required as a predicate for liability under Section 10(b) or Rule 10b-5. Thus, in similar settings, claims against credit rating agencies regarding their opinions have been rejected. See Mallinckrodt Chem. Works v. Goldman, Sachs & Co., 420 F. Supp. 231, 241 (S.D.N.Y. 1976); In re Republic Nat'l Life Ins. Co., 387 F. Supp. 902, 906 (S.D.N.Y. 1975).

In the case at hand, Deutsche Bank did nothing more than opine on Enron's share value based on information publicly disclosed by Enron. The "buy" recommendations were not offered as "facts" nor did Deutsche Bank represent in any of the research reports quoted in the Complaint that it was doing anything other than giving an opinion based on information publicly released by Enron itself. Plaintiffs have pled no facts that would support treating these opinions as false or misleading "facts."

Given plaintiff's pleading failures, the Newby Complaint also does not support the existence of any duty running from Deutsche Bank to plaintiffs regarding Enron. That is, absent the pleading of particularized facts supporting a fraud claim, Deutsche Bank had no general duty to plaintiffs to investigate and report on Enron. See Chiarella v. United States, 445 U.S. 222, 235 (1980) ("When an allegation of fraud is based upon nondisclosure, there can be *no fraud absent a duty* to speak. We hold that a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information.") (emphasis added); cf. Dirks v. SEC, 463 U.S. 646, 654 (1983) ("We were explicit in Chiarella in saying that there can be no duty to disclose where the person who has traded on inside information 'was not [the corporation's] agent, ... was not a fiduciary, [or] was not a person in whom the sellers [of the securities] had placed their trust and confidence."); Central Bank, 511 U.S. at 174 (citing with approval its holding in Chiarella that there must be an independent duty of disclosure before an omission may be subject to liability under Rule 10b-5). Thus, the Newby Complaint should be dismissed on this basis as well.

POINT IV

THE NEWBY COMPLAINT VIOLATES RULE 8

Federal Rule 8 requires that a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). As noted by the Fifth Circuit, "the law does not require, nor does justice demand, that a judge must grope through (thousands of) pages of irrational, prolix and redundant pleadings." Gordon v. Green, 602 F.2d 743, 746 (5th Cir. 1979), cert. denied, 459 U.S. 1203 (1983) (dismissing verbose complaint filled with extraneous material) (citation omitted). The Newby Complaint violates this rule as to Deutsche Bank.

The Newby Complaint presents Deutsche Bank with a collection of news articles and

repetitive allegations "that a pleader, aware of and faithful to the command of the Federal Rules of Civil Procedure, knows to be completely extraneous." Gordon, 602 F.2d at 745. For example, plaintiffs rely on news articles, cited repeatedly, regarding the LJM2 partnership. See Newby Cpt. ¶¶ 30, 71, 72, 648 (paragraphs 30 and 648 are almost identical). Plaintiffs also make rote allegations, sometimes based on news articles, regarding the motive of the banks to participate in the alleged fraud. Id. at ¶¶ 26, 70(c), 72, 288, 647, 794, 796. Plaintiffs' claims regarding the absence of firewalls also appear to be based on news articles. Id. at ¶¶ 643-44.

A complaint, however, "is not a vehicle in which to air and put in issue the views of newspapers, magazines, and social engineers, and their conclusions." Thomson v. Morgan Stanley Dean Witter & Co., No. 01 CIV. 7071(MP), 2001 WL 958925, at *1 (S.D.N.Y. Aug. 21, 2001) (dismissing claims against analysts for harms allegedly resulting from recommendations).[9] "A defendant facing this kind of a complaint is forced to select the relevant material from an entangled mass of verbiage. That there should be compliance with Rule 8 and the [Public Securities Litigation] Reform Act is absolutely clear." Thomson, 2001 WL 958925, at *1.[10] Thus, the purpose of Rule 8 is "'to Eliminate prolixity in pleading and to achieve brevity, simplicity, and clarity.'" Gordon 602 F.2d at 746 (citations omitted). As shown above, the Newby Complaint violates Rule 8 and should be dismissed.

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[9] Seven other "virtual word for word cop[ies] of the [Thomson] complaint" also were dismissed. See Malvan v. Morgan Stanley Dean Witter & Co., No. 01 CIV. 7071(MP), 2001 WL 965294, at *1 (S.D.N.Y. Aug. 21, 2001).

[10] See also Carrigan v. California State Legislature, 263 F.2d 560, 567 (9th Cir. 1959) (affirming dismissal without prejudice of 186 page complaint filled with hearsay statements and other extraneous material); Silver v. Queen's Hospital, 53 F.R.D. 223, 227 (D. Haw. 1971) (ordering plaintiff to file new complaint to replace one containing "voluminous" and "clearly extraneous allegations"); Johnson v. Hunger, 266 F. Supp. 590, 591 (S.D.N.Y. 1967) (dismissing without prejudice complaint that was "a confusing and foggy mixture of evidentiary statements, arguments and conclusory matter."); Benner v. Phila. Musical Soc'y, 32 F.R.D. 197, 198 (E.D. Penn. 1963) (dismissing without prejudice complaint filled with "prolix, argumentative and conclusionary [sic] paragraphs.").

POINT V

PLAINTIFFS FAIL TO PLEAD THAT DEFENDANT IS A CONTROL PERSON UNDER SECTION 20(A) OF THE 1934 ACT

As shown above, plaintiffs fail to adequately plead a claim against Deutsche Bank under Section 10(b) and Rule 10b-5 of the 1934 Act. Absent an adequately pled claim of primary liability under Section 10(b), plaintiffs cannot assert a claim against Deutsche Bank under Section 20(a). Nathenson, 267 F.3d at 426 n.29; In re BMC Software, 183 F. Supp. 2d at 888, citing Abbott v. Equity Group, Inc., 2 F.3d 613, 619-20 (5th Cir. 1993), cert. denied, 510 U.S. 1177 (1994).

Even if plaintiffs had adequately pled a valid claim under Section 10(b), they also have failed entirely to meet their burden to plead facts establishing Deutsche Bank's control or ability to control Enron (or any other defendant accused of securities fraud in the Newby Complaint). See generally Dennis v. General Imaging, Inc., 918 F.2d 496, 509 (5th Cir. 1990). Thus, plaintiffs' Section 20(a) claim also should be dismissed.

CONCLUSION

For the reasons stated above, Defendant Deutsche Bank AG respectfully requests that this Court dismiss the Newby Complaint against it, and grant Deutsche Bank AG such other and further relief to which they may be entitled.

Dated: May 9, 2002

Respectfully submitted,

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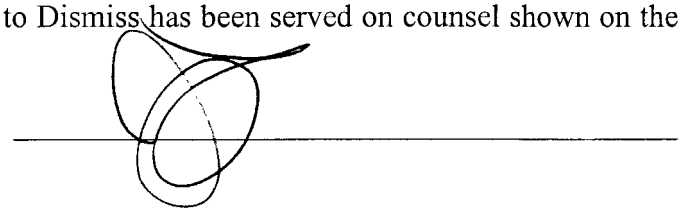
I certify that a true and correct copy of this Corrected Memorandum of Law in Support of Defendant Deutsche Bank AG's Motion to Dismiss has been served on counsel shown on the attached service list on May 9th, 2002.



APPENDIX

APPENDIX

PARAGRAPHS IN NEWBY COMPLAINT RELATING TO CLAIMS AGAINST DEUTSCHE BANK AG

A. Paragraphs Mentioning Deutsche Bank

17, 26, 48, 49, 70(c), 71, 83(i) 107, 127, 131, 135, 146, 152, 159, 184, 210, 232, 237, 243, 253, 257, 288, 393, 498, 590, 647-48, 787-799, 993(d)

1. Paragraphs Mentioning Deutsche Bank as Underwriter

48, 49, 135, 590, 790-792, 795

2. Paragraphs Mentioning Deutsche Bank Analyst Reports

127, 131, 146, 152, 159, 184, 210, 232, 237, 243, 253, 257

3. Paragraphs Mentioning Deutsche Bank and LJM2

26, 48, 70, 71, 393, 647, 648, 787, 797

B. Paragraphs Titled "Involvement of Deutsche Bank"

787-799

C. Paragraphs That Appear Directed At Deutsche Bank As A "Bank Defendant"

72, 155, 189, 214, 300, 642-646, 651

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